

FILE COPY

U.S. - Supreme Court, U.S.

FILED

SEP 3 1947

In the Supreme Court,

ELMORE GROFF
CLEAR

OF THE
United States

OCTOBER TERM, 1947

No. 317

NICK DELIS,

Petitioner,

vs.

GEORGE P. PAPPAS, EVANGELINA PAPPAS
and GUS KAVALOS, doing business under
the fictitious name of Pappas & Co.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
in and for the Fourth Appellate District.

WILLIAM E. FERRITER,

JAMES C. PURCELL,

WILLIAM PETROS,

Mills Tower, San Francisco 4, California,

Attorneys for Petitioner.

Subject Index

	Page
Summary and short statement of the matter involved.....	2
Statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment in question	8
Statement of the grounds upon which it is contended that the questions involved are substantial.....	9
I.	
The District Court of Appeal has erred in its construction of the purpose and effect of the applicable regulation of the Office of Price Administration	9
II.	
If the judgment of the state court is executed, petitioner may be prosecuted criminally in the federal courts.....	12
The stage of the proceedings and the manner in which the federal questions were raised	13
Reasons relied upon for the allowance of writ.....	13

Table of Authorities Cited

Cases	Page
Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 893	11
Case v. Bowles, 66 S. Ct. 488	11
Cunningham v. Neagle, 135 U. S. 1, 34 L. Ed. 55.....	12
In re Debs, 158 U. S. 564, 39 L. Ed. 1092.....	12
Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633	8
Lovett v. Bell (1947), 30 A. C. 8	11
Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 S. Ct. 72, 64 L. Ed. 112	8
Smith v. United States, 83 Fed. (2d) 631.....	13
Virginian Ry. Co. v. Mullens, 271 U. S. 220, 46 S. Ct. 526, 70 L. Ed. 915	8
Western Union Telegraph Co. v. Crovo, 220 U. S. 364, 31 S. Ct. 399, 55 L. Ed. 498.....	8
Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834	11

Statutes

Emergency Price Control Act:	
Section 4-a	10
Section 205(b)	12
U. S. C. A., Title 28, Section 344, subdivision (b).....	8

Regulations

Revised Maximum Price Regulation 271	9
--	---

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1947

No.

NICK DELIS,

Petitioner,

vs.

GEORGE P. PAPPAS, EVANGELINA PAPPAS
and GUS Kavalos, doing business under
the fictitious name of Pappas & Co.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
in and for the Fourth Appellate District.

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

The petition of Nick Delis for a Writ of Certiorari
to the District Court of Appeal of the State of Cali-
fornia, in and for the Fourth Appellate District,
respectfully shows to Your Honors:

**SUMMARY AND SHORT STATEMENT OF THE
MATTER INVOLVED.**

Respondent, who was plaintiff in the trial Court, sued to recover a balance allegedly due on a contract in the following words and figures:

“Mendota, California, September 1, 1945. Contract.

A contract between Pappas & Co., Mendota, California, Fresno County, hereinafter known as the party of the first part, and Nick Delis, 450 Front Street, San Francisco, California, hereinafter known as the party of the second part. Party of the second part agrees and binds himself to buy from the party of the first part 40 acres of onions, more or less, for the contract price of \$16,000, grown on Section 18-14-14, Fresno County, grown in the 1945 season. The payments to be made by the party of the second part are as follows: \$1000.00 at the signing of this contract, \$7000.00 when picking starts, and the balance as the party of the first part may demand.” Signed: “Pappas & Company, by George P. Pappas, party of the first part. Nick Delis, by Nick Delis, party of the second part.” (Typewritten Trans., pp. 10, 16, 21.)

The petitioner was permitted by the Court to amend his answer upon the trial of the cause to allege illegality of the contract under the provisions of the Emergency Price Control Act; and that by virtue of the rules and regulations and laws of the Office of Price Administration and pursuant to the Emergency (Price) Control Act of 1942, said defendant was, by reason and virtue thereof, unable to so perform and

make payment of the whole of the said purchase price, as said action and conduct upon the part of the said defendant in so doing would constitute a violation of the Emergency (Price) Control Act of 1942 and would subject plaintiffs and defendant to civil and criminal liability, pursuant to the rules and regulations and laws of said Office of Price Administration. It was denied that \$15,000 was due, or any sum in excess of the value of said onions as determined by the rules and regulations and the laws promulgated by the Office of Price Administration, pursuant to the enactment of the Emergency (Price) Control Act of 1942.

The respondent Pappas testified in substance as follows:

That at the time this contract was signed, Mr. Delis and respondent did not know how many sacks of onions were on that particular acreage mentioned in the contract. That there was no tonnage and no sacks mentioned in that contract, that Nick Delis and respondent went through the field two times from one end to the other. That respondent did not know how many sacks of onions were on that particular field. That respondent did not know the weight of the onions in that field. That respondent did not know the amount of onions per acre on that particular field mentioned in the contract. That there was no discussion by respondent and Mr. Delis, concerning the rules and regulations of the Office of Price Administration. That if there were only 10 sacks of onions on that field mentioned in the contract, he expected to get \$16,000.00. (Typewritten Trans., p. 19.)

Thereupon counsel for the petitioner made a motion for judgment in favor of the defendants and likewise asked leave to amend to conform with the proof of the illegality of the contract. The motion for judgment was denied. Motion for judgment on the pleadings was denied. Thereupon, counsel for the defendant, the petitioner herein, made a motion for judgment in favor of the defendant, which motion was denied. Thereupon, counsel for the respondent said he had no objection to an amendment, to the effect that said contract is illegal on its face and in violation of the rules and regulations of the Office of Price Administration and the Emergency Price Control Act of 1942. Thereupon, the Court granted leave to amend, pursuant to said lack of objection. Thereupon, it was agreed in open Court that the verification attached to the original answer was deemed to be the verification to the amendment.

The amendment to the answer which sets up the illegality of the contract in that it violates the rules and regulations of the Price Control Act was duly filed. (Typewritten Trans., p. 13.)

Thereafter, the trial Court gave judgment in favor of plaintiff and respondent for the amount demanded in the complaint, to-wit, \$15,000.00, with interest and costs. (Typewritten Trans., p. 25.)

Thereafter, petitioner appealed to the District Court of Appeal of the State of California for the Fourth Appellate District, an intermediate Appellate Court which has appellate jurisdiction under the constitution of California of such actions at law as this

one. The sole question raised upon the appeal by petitioner was the illegality of the contract under the Emergency Price Control Act and certain regulations adopted thereunder. The particulars wherein petitioner contends that the contract was repugnant to the laws of the United States are briefly but accurately set forth in the following language of his petition for a hearing in the State Supreme Court:

“ILLEGALITY OF CONTRACT.

Revised Maximum Price Regulation 271 provides for the sale of onions at per acre prices without reference to the actual yield.

A. Article II is entitled ‘Maximum Prices for Table Stock Potatoes and Onions’ and therefore its provisions and any explanatory matter included therein apply equally to potatoes or onions.

B. Section 9A under Article II therefore applies to both potatoes and onions as well as to the explanatory matter contained therein.

Example 2 in Section 9A shows the case of a country shipper e. g. in the State of California who wishes to sell unharvested potatoes and concludes with these words: ‘You may also contract to sell these potatoes by the acre, but your contract in such a case must provide that the ultimate selling price will be the per acre price or \$2.45 cwt. according to the actual yield per acre, whichever is lower. You may not sell unharvested potatoes at a per acre price because you must know the yield before you can figure the prices per hundred weight.’

Example 2, although referring specifically to potatoes, applies equally to onions.

(a) Its language is equally applicable to onions.

(b) It appears in a section which sets price ceilings for both potatoes and onions.

(c) Section 9A sets ceiling prices 'f.o.b., the country shipping point'.

(d) Section 8-10 defines country shipping point as being a farm or other place in or near the producing area from which potatoes and onions are sold, shipped, delivered, or otherwise transferred to any person * * *

It is submitted that the contract in question is contrary to the provisions of the Emergency Price Control Act of 1942 as amended, and that said contract is therefore unlawful for the following additional reasons:

(1) Section 4A of the Emergency Price Control Act provides:

'It shall be unlawful regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity or otherwise do or omit to do any action, in violation of any regulation or order under Section II.'

The contract in question is in violation of Revised Maximum Price Regulation 271 in that it purports to set a flat price for the sale of unharvested onions in the 40 acres without reference to the specific yield."

The District Court of Appeal filed an opinion affirming the judgment (Typewritten Trans., p. 63, et seq.), and on May 27, 1947, denied a rehearing. (Trans. p. 72.)

Under the constitution of California the State Supreme Court, may of its own motion or on petition, grant a hearing of the cause after decision by the District Court of Appeal, within sixty days. Within the time allowed by the rules of the State Supreme Court, petitioner filed a petition for a hearing therein, which petition was denied by the California Supreme Court June 26, 1947. (Trans. p. 73.)

The presiding justice of the District Court of Appeal thereafter and on July 14, 1947 (Trans. p. 74), made an order staying enforcement and execution of the judgment of the Superior Court to permit petitioner to apply to the Supreme Court of the United States for a writ of certiorari.

Accordingly, the federal question thus presented may be stated concisely and accurately as follows: **Is a contract which was entered into in violation of a price regulation adopted by the federal Price Administrator pursuant to the powers conferred upon him by the Emergency Price Control Act, enforceable in the State Courts?**

**STATEMENT PARTICULARLY DISCLOSING THE BASIS
UPON WHICH IT IS CONTENDED THAT THIS COURT
HAS JURISDICTION TO REVIEW THE JUDGMENT IN
QUESTION.**

(a) The statutory provisions believed to sustain the jurisdiction: U. S. C. A., Title 28, Section 344, subdv. (b).

(b) The date of the judgment of the State Court sought to be reviewed—April 29, 1947, rehearing denied May 27, 1947, hearing denied by State Supreme Court June 26, 1947.

(c) That the nature of the cause, and the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied upon, is sufficiently set forth in the preceding summary statement of the matter involved, and from the certificate of the presiding justice of the State Court. (Type-written Trans., p. 79.)

(d) The cases believed to sustain the jurisdiction are in part as follows:

Pacific Gas & Electric Co. v. Police Court, 251

U. S. 22, 40 S. Ct. 72, 64 L. Ed. 112;

Western Union Telegraph Co. v. Crovo, 220 U.

S. 364, 31 S. Ct. 399, 55 L. Ed. 498;

Virginian Ry. Co. v. Mullens, 271 U. S. 220,

46 S. Ct. 526, 70 L. Ed. 915;

Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387,

50 L. Ed. 633.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

I.

THE DISTRICT COURT OF APPEAL HAS ERRED IN ITS CONSTRUCTION OF THE PURPOSE AND EFFECT OF THE APPLICABLE REGULATION OF THE OFFICE OF PRICE ADMINISTRATION.

It is not necessary to repeat the statements as to the provisions of the price regulations involved and upon which petitioner contends that the contract sued upon herein was void. It is admitted in the opinion of the learned presiding justice that a duly adopted and duly promulgated regulation of the Office of Price Administration fixes the so-called "ceiling price" of onions at a certain sum per hundred weight, and prohibits the sale thereof on any other basis. A price per acre is expressly prohibited "because you must know the yield before you can figure the price per cwt." The contract which is set forth above in *haec verba* provides that

"Second party (petitioner) agrees and binds himself to buy from the party of the first part (respondents) 40 acres onions, more or less, for the contract price of \$16,000."

This is clearly in violation of the regulation that the sale of the commodity must be by the hundred-weight and that it cannot be made by the acre or acres.

Revised Maximum Price Regulation 271, which was in effect at the time that the contract was entered into, provides that,

“Regardless of any contract or other obligation, no person shall sell or deliver, and no person in the course of trade or business, shall buy or receive, potatoes and onions at prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing.”

Clearly, this section of the regulation prohibits the making of such a contract as the one sued upon in the case at bar.

The Act of Congress which created the Office of Price Administration, and which commonly is referred to as the Emergency Price Control Act (section 4-a), provides:

“2. It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity * * * in violation of any regulation or order under section 2, or any price schedule effective in accordance with the provisions of section 206, or of any regulation, order or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.”

The constitutionality of this Act has been upheld, and the stamp of approval has been placed upon its purposes. This high Court has gone so far as to hold that the validity of regulations adopted by the Price Administrator cannot be questioned by the defendant

in a civil suit or raised as a defense in a criminal prosecution. See

Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834; and

Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 893.

As to the binding effect of regulations adopted by the Price Administrator pursuant to the power delegated to him by the **Emergency Price Control Act**, see the recent case of *Lovett v. Bell*, decided April 29, 1947 (30 A. C. 8), in which the Supreme Court of California, referring to a written modification of a lease whereby the lessees relinquished any interest in the premises, held that the instrument contravened the **Emergency Price Control Act** and was therefore void. The State Court, citing *Case v. Bowles*, 66 S. Ct. 488, says that the defendants could not be estopped to take a position contrary to their waiver, and uses the following language:

"But such argument cannot affect the determination of the jurisdictional question as to the application of the rent regulation in furtherance of sound public policy as declared by the act. Within its scope **the act is the supreme law of the land** and supersedes state statutes which are inconsistent with its purpose."

II.

**IF THE JUDGMENT OF THE STATE COURT IS EXECUTED,
PETITIONER MAY BE PROSECUTED CRIMINALLY IN THE
FEDERAL COURTS.**

It is a criminal offense, not only to sell commodities for more than the maximum price fixed by a regulation, but to so buy or receive them. We submit that the decision of the State Court places petitioner in an extremely invidious position. He has given a bond to stay execution of the money judgment rendered against him in the Court below. If the judgment is affirmed, he will be compelled to pay the contract price of the commodity. By so doing, he will subject himself to the possible penalty of a year in jail and a fine of five thousand dollars. (*Emergency Price Control Act*, Section 205(b).) The judgment of the State Court, based upon no other authority than the opinion of a federal *nisi prius* judge, which is not even authority in that judge's own district, cannot be pleaded as a bar to a criminal prosecution in the Federal Court. The opinion of the State Court will be no defense to him, because no Court of any State can by its decision prevent the enforcement of a federal law. The power of the United States, when exercised within constitutional limits, has been said by this Honorable Court to extend to every foot of soil and to every person within its territorial limits. (*Cunningham v. Neagle*, 135 U. S. 1, 34 L. Ed. 55; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092.) That one charged with crime in a Federal Court cannot plead a judgment of a State Court as

res judicata is specifically held in *Smith v. United States*, 83 Fed. (2d) 631.

**THE STAGE OF THE PROCEEDINGS AND THE MANNER
IN WHICH THE FEDERAL QUESTIONS WERE RAISED.**

These matters are set forth with appropriate reference to, and quotations from, the record, in the foregoing summary statement of the matter involved, and restatement of the same is omitted in the interest of brevity.

**REASONS RELIED UPON FOR THE ALLOWANCE
OF WRIT.**

These reasons are heretofore set forth with sufficient particularity of statement, and the restatement of what is heretofore said under the heading of the grounds upon which it is contended that the questions involved are substantial, is omitted in the interest of brevity.

In view of the contentions heretofore made and the authorities cited, we deem a supporting brief unnecessary to the consideration of this petition, and forbear its presentation in the interest of brevity.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the honorable judges of the District Court of Appeal of the State of California, in and for the Fourth Appellate District,

commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the cause entitled as above; and that the judgment of said District Court of Appeal may be reviewed by Your Honors and the judgment thereof reversed; and that your petitioner have such other and further relief as to this Honorable Court shall seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
August 12, 1947.

WILLIAM E. FERRITER,
JAMES C. PURCELL,
WILLIAM PETROS,

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,

August 12, 1947.

JAMES C. PURCELL,

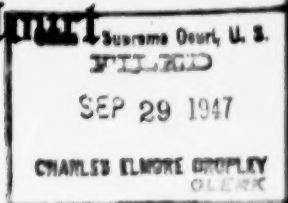
Of Counsel for Petitioner.

FILE COPY
In the Supreme Court

OF THE
United States

OCTOBER TERM, 1947

No. ~~21~~ 317



NICK DELIS,

Petitioner,

VS.

GEORGE P. PAPPAS, EVANGELINA PAPPAS and
GUS KAVALOS, doing business under the
fictitious name of Pappas & Co.,

Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the Fourth Appellate District.**

AYNESWORTH & HAYHURST,

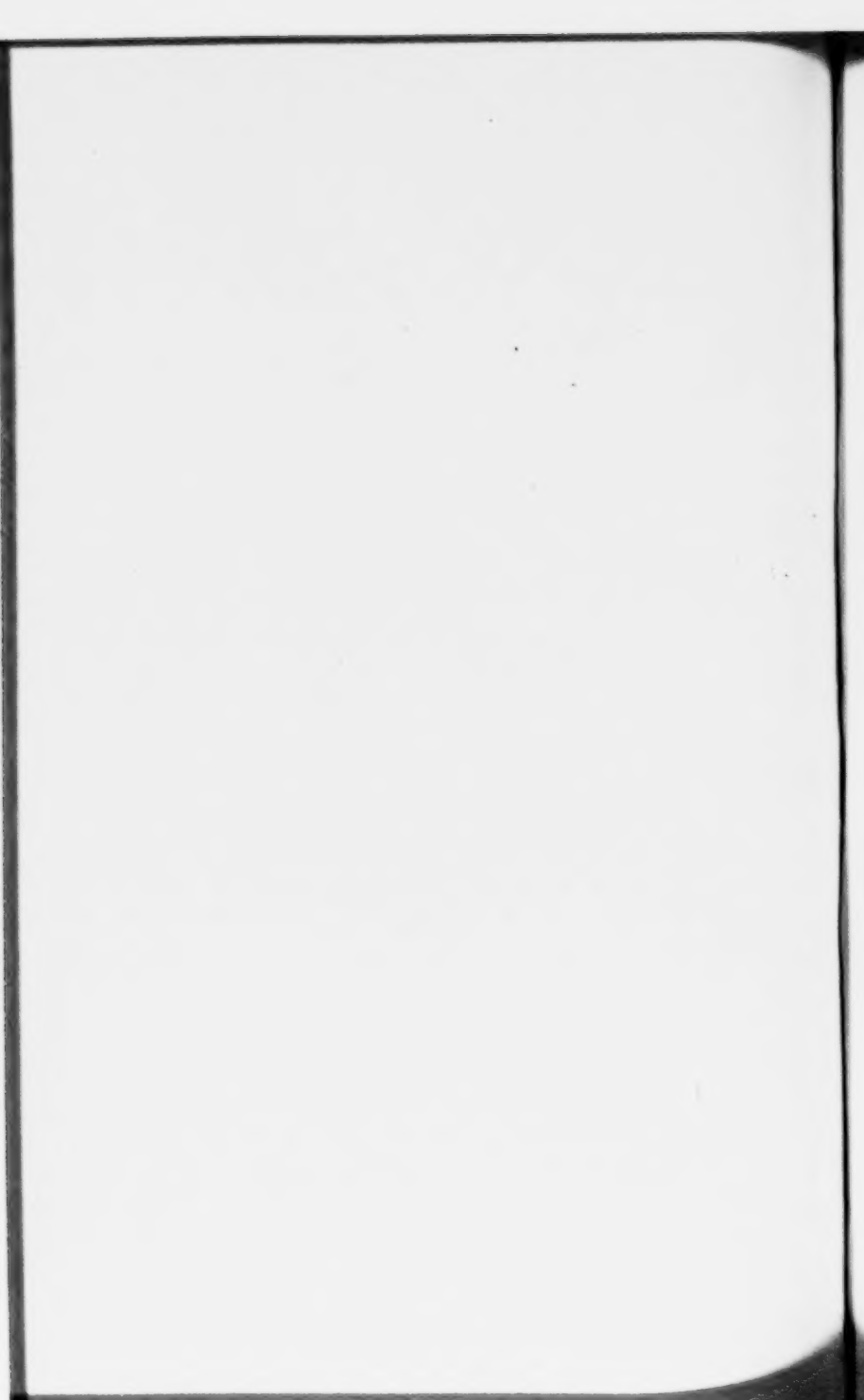
✓ G. L. AYNESWORTH,

✓ L. NELSON HAYHURST,

no JOHN J. GALLAGHER,

Helm Building, Fresno 1, California,

Attorneys for Respondents.



Subject Index

	Page
Statement of the case	1
Argument	4
I.	
The District Court of Appeal has not erred in its construction of the purpose and effect of the regulation of the Office of Price Administration	4
II.	
Even if Emergency Price Control Act of 1942 and Revised Maximum Price Regulation 271 were applicable, there was no evidence from which the contract could be found illegal	4
III.	
Petitioner will not be prosecuted criminally in the federal courts if the judgment of the state court is executed.....	7
Conclusion	8

Table of Authorities Cited

Cases	Page
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681	6
Hobbs v. McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940	5
Pappas v. Delis, 79 A.C.A. 443 (Cal.)	4
Steele v. Drummond, 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238	6
Thornton v. Bank of Washington, 28 U. S. 36, 3 Pet. 36, 7 L. Ed. 594	6
United States v. Grace Angelical Church, 132 F. (2d) 460	6
Statutes	
Emergency Price Control Act of 1942.....	3
Regulations	
Revised Maximum Price Regulation.....	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 217

NICK DELIS,

Petitioner,

VS.

GEORGE P. PAPPAS, EVANGELINA PAPPAS and
GUS KAVALOS, doing business under the
fictitious name of Pappas & Co.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the Fourth Appellate District.

STATEMENT OF THE CASE.

There is no real dispute as to the facts in this case.
The parties made a written contract reading as follows:

“Mendota, California. September 1, 1945.

“CONTRACT

“A contract between Pappas & Company, Mendota, California, Fresno County, hereinafter known as the party of the first part, and Nick Delis, 450 Front Street, San Francisco, California, hereinafter known as the party of the second part.

“Party of the second part agrees and binds himself to buy from the party of the first part 40 acres of onions, more or less, for the contract price of \$16,000.00, grown on Section 18-14-14, Fresno County, grown in the 1945 season.

“The payments to be made by the party of the second part are as follows: \$1000.00 at the signing of this contract, \$7000.00 when picking starts, and the balance as the party of the first part may demand.

“Pappas & Company, by, By George B. Pappas, Party of the First Part. Nick Delis, by Nick Delis, Party of the second part.”

(Transcript of Record, pages 7 and 29.)

Petitioner paid \$1000.00 when the agreement was executed. He took possession of the field, harvested and removed the onion crop over a month later. However, petitioner has refused to pay the balance of \$15,000.00 payable under the contract. (Transcript of Record, page 30.)

Respondents brought this action for the balance payable under the contract. At the trial no evidence was offered by petitioner. It is admitted that the \$15,-

000.00 has not been paid and petitioner's only defense is the claim that the agreement was illegal and void on its face as being in violation of the Emergency Price Control Act of 1942, as amended, and certain regulations adopted thereunder.

The judgment of the Superior Court of the State of California, in and for the County of Fresno, for respondents and against petitioner was affirmed by the District Court of Appeal, State of California, Fourth Appellate District, and a hearing was denied by the Supreme Court of the State of California.

Petitioner, on page 7 of his petition for writ of certiorari, states that the federal question presented is as follows:

"Is a contract which was entered into in violation of a price regulation adopted by the federal Price Administrator pursuant to the powers conferred upon him by the Emergency Price Control Act, enforceable in the State Courts?"

Respondents believe this to be an inaccurate statement of the question.

Respondents believe first, that the provisions of the Emergency Price Control Act of 1942, as amended, and Revised Maximum Price Regulation 271 are not applicable to the contract and that the agreement cannot in any way be construed to be a violation of the act and regulation, and second, that even if the act and regulation were applicable, the record is wholly devoid of any evidence which would show a violation of the act or regulation.

ARGUMENT.**I.**

THE DISTRICT COURT OF APPEAL HAS NOT ERRED IN ITS CONSTRUCTION OF THE PURPOSE AND EFFECT OF THE REGULATION OF THE OFFICE OF PRICE ADMINISTRATION.

The decision of the District Court of Appeal, State of California, Fourth Appellate District, is set forth on pages 35 et. seq. of the Transcript of Record, and is reported in 79 A.C.A. 443. This decision sets forth fully and clearly the reasons why the transaction involved did not violate the provisions of the Emergency Price Control Act and Revised Maximum Price Regulation 271. It is self-explanatory and in the interest of brevity no further elaboration is necessary.

The cases cited by petitioner upon page 11 of his petition need not be discussed since they are not in point. The question in the instant case was not before the Court in any of them, and nothing contained in them can be advanced as authority for the issues raised in the present case.

II.

EVEN IF EMERGENCY PRICE CONTROL ACT OF 1942 AND REVISED MAXIMUM PRICE REGULATION 271 WERE APPLICABLE, THERE WAS NO EVIDENCE FROM WHICH THE CONTRACT COULD BE FOUND ILLEGAL.

As was aptly stated in the decision in this case by the District Court of Appeal, State of California, Fourth Appellate District:

"Not only does it not appear upon the face of this transaction that it was illegal and void, but there is no evidence in the record from which the court could have found that the contract was illegal or that it was in violation of these regulations. The appellant harvested and removed these onions and is the only one who knew or could have produced evidence as to the quantity of onions which was eventually produced and taken by the appellant by virtue of this sale. He failed to produce any evidence as to this fact, and all presumptions are in favor of the judgment and not against it. For anything that here appears the quantity of onions produced and taken by the appellant may have been such that the contract price agreed upon was at a rate far below the maximum prices provided for in RMPR 271, assuming that the provisions of that regulation were applicable and material here.

"The plain situation is that the appellant has failed to meet the prima facie case made by the respondents and has failed to sustain the burden of proof resting upon him. (*Basler v. Sharp & Fellows Co.*, 73 Cal. App. 2d 480; *Balfour v. Heuer*, 77 A.C.A. 236; *Thacker v. American Foundry*, 78 A.C.A. 72; *Gelb v. Benjamin*, 78 A.C.A. 970." (Transcript of Record, page 40.)

It is a rule of interpretation that where a contract is fairly open to two constructions, one of which is lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 567, 6 S. Ct. 870,
29 L. Ed. 940.

As was pointed out in *Steele v. Drummond*, 275 U. S. 199, 48 S. Ct. 53, 72 L. Ed. 238:

“* * * It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. *Baltimore & Ohio Southwestern Ry. v. Voigt*, 176 U. S. 498, 505, 20 S. Ct. 385, 44 L. Ed. 560. The meaning of the phrase ‘public policy’ is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. 1 Story on Contracts (5th Ed.) #675; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 233, 12 S. Ct. 632, 36 L. Ed. 414. It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. *Atlantic Coast Line R. R. Co. v. Beazley*, 54 Fla. 311, 387, 45 So. 761; *Barrett v. Carden*, 65 Vt. 431, 433, 26 A. 530, 36 Am. St. Rep. 876; *Richmond v. Dubuque & Sioux City R. R. Co.*, 26 Iowa 191, 202; *Eger-ton v. Earl Brownlow*, 4 H. L. Cas. 1, 122; *Richardson v. Mellish*, 2 Bing, 229, 242, 252. Detriment to the public interest will not be presumed, where nothing sinister or improper is done or contemplated. *Valdes v. Larrinaga*, 233 U. S. 705, 709, 34 S. Ct. 750, 58 L. Ed. 1163.”

See also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 48 S. Ct. 404, 72 L. Ed. 681.

An illegal contract will not be presumed but must be established by the evidence.

Thornton v. Bank of Washington, 28 U. S. 36.

The burden of the showing of the illegality is upon the party asserting it.

U. S. v. Grace Angelical Church, 132 F. (2d) 460.

The petitioner failed to sustain the burden of pleading and proving the illegality of the transaction.

III.

PETITIONER WILL NOT BE PROSECUTED CRIMINALLY IN THE FEDERAL COURTS IF THE JUDGMENT OF THE STATE COURT IS EXECUTED.

The argument of petitioner that he may be prosecuted criminally in the Federal Courts if the judgment of the State Court is executed is answered by the statements contained heretofore. As a practical matter, it might be added that since there is no evidence of any purchase by petitioner of commodities for more than the ceiling price, and that since the United States District Court, Southern District of California, Northern Division, in the case of *George H. Barnett v. Atlantic Commission Company, Inc.*, 233 Civil (referred to in Transcript of Record, pages 22, 26, 27 and 36) held that the pertinent Office of Price Administration regulations were not intended to be applicable to a sale of growing crops in the field, petitioner's fear of criminal prosecution seems somewhat exaggerated.

CONCLUSION.

Respondents respectfully request that the application for a writ of certiorari be denied.

Dated, Fresno, California,
September 17, 1947.

AYNESWORTH & HAYHURST,
G. L. AYNESWORTH,
L. NELSON HAYHURST,
JOHN J. GALLAGHER,
Attorneys for Respondents.